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No. 72-96

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

MEMPHIS LIGHT, GAS AND WATER DIVISION, *Petitioner*
v.
FEDERAL POWER COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF TEXAS GAS TRANSMISSION CORPORATION IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A1-A23) is not yet reported. The opinion of the Federal Power Commission (Commission) (Pet. App. B1-B4) is reported at 43 FPC 740, and its order denying rehearing (Pet. App. B5-B9) is reported at 44 FPC 16.

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1972. An extension of time for filing a brief in opposition in this cause was granted by this

Court on August 10, 1972, extending the time to September 7, 1972. Jurisdiction to review the judgment in question by writ of certiorari is converred upon this Court by 28 U.S.C. § 1254, and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTION PRESENTED

Whether a utility's rates may be reduced upon the *assumed* availability of a tax deduction resulting from the use of liberalized depreciation with respect to its post 1969 expansion property under circumstances where Congress, in enacting the Tax Reform Act of 1969, has clearly provided that such a deduction would not be available for such purposes?

STATUTES INVOLVED

Section 441 of the Tax Reform Act of 1969, 26 U.S.C. § 167(1), is set forth in an attachment to the petition (Pet. App. C).

STATEMENT

In order to avoid duplication, Texas Gas Transmission Corporation (Texas Gas), an intervenor in the proceedings in the court below, hereby adopts the Statement of the Solicitor General in his Brief for the Federal Power Commission in Opposition which is being filed in this cause substantially concurrently herewith.

ARGUMENT

Texas Gas opposes the granting of a writ of certiorari in this cause for all of the reasons set forth by the Solicitor General in his Brief for the Federal Power Commission in Opposition which reasons we hereby adopt and fully support. There are, however, a few points which, in our opinion, deserve special emphasis. Our Brief, therefore, will be limited to these.

This cause involves the regulatory treatment which is to be accorded post 1969 public utility expansion property as to which an election has been made under Section 441(a) of the Tax Reform Act of 1969. That section expressly provides that, once a utility such as Texas Gas makes a timely election, liberalized depreciation with flow-through would no longer be considered a "reasonable allowance" for tax depreciation purposes within the meaning of the Internal Revenue Code:[1]

> (A) *Election as to new property representing growth in capacity.*—If the taxpayer makes an election under this subparagraph within 180 days after the enactment of this subparagraph in the manner prescribed by the Secretary or his delegate, in the case of taxable years beginning after December 31, 1970, paragraph (2)(C) [concerning liberalized depreciation with flow-through] shall not apply with respect to any post-1969 public utility property, to the extent that such property constitutes property which increases the productive or operational capacity of the taxpayer with respect to the goods or services described in paragraph (3)(A) and does not represent the replacement of existing capacity."[2] (Bracket Material Supplied)

Paragraph (2)(c) in Section 441(a) refers, as indicated, to liberalized depreciation with flow-through as a "reasonable allowance" for tax depreciation purposes. There is, and can be, no argument about this.

The legislative history with respect to Section 441(a) of the 1969 Tax Reform Act completely supports the

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[1] Int. Rev. Code of 1954 § 167(a)

[2] Id. § 167(1)(4)(A)

above interpretation. The Report of the Senate Finance Committee states:

> "The [Senate] committee amendments, while in most respects the same as the House provisions, differ in one principal area. The amendments permit an election to be made within 180 days after the date of enactment of the bill for a utility covered by this provision to shift from the flow-through to the straight-line method, *with or without the permission of the appropriate regulatory agency, or permit it with the permission of the regulatory agency to shift to the normalization method* (that is, come under general rules of the bill).
>
> "*This election applies both as to new and existing property* . . . Since the company would no longer be permitted to use accelerated depreciation (unless the agency later permits it to normalize), *the agency would not be able to impute the use of accelerated depreciation with flow-through.*[3] (Italics supplied)

Contrary to the assertion of Petitioner, the statement of the Senate Finance Committee that a regulatory agency would not be able to impute the use of accelerated depreciation with flow-through, once an election had been made, was not a casual remark. This was a fully considered statement of intent with respect to the special election. It was the very purpose of providing for such an election. Without such a purpose, the election would have no meaning. It is true that the Senate version of the Tax Reform Act provided an election which applied to both new and existing property. The House version did not contain an election.

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[3] S. Rep. No. 552, 91st Cong., 1st Sess. 173-74 (1969)

Thus, the Conference Committee, as a compromise, restricted the election to apply only to post-1969 expansion property, fully preserving, however the original intent of the Senate:

> "The conference substitute (sec. 441 of the substitute and sec. 167(l) of the code) *follows the Senate amendment except that* the special provision referred to in (e) above is stricken and *the 180-day election (item (d), above) is modified to apply to new property and not to replacement property.* Even in the case of new proprty, however, the right to change over from the flow-through method is to be available only to the extent the new property increases the productive or operational capacity of the company.[4] (Italics supplied)

It is, indeed, difficult to conceive as to how Petitioner, in light of the above, could seriously contend that Congress, as to post 1969 expansion property, did not intend to restrict and limit the discretion of regulatory agencies in the rate treatment of tax depreciation.

This is not similar to the election involved in the *Alabama-Tennessee* case[5] or the *Midwestern* case[6] relied upon by Petitioner. In *Alabama-Tennessee,* the court found that Congress had not considered the regulatory consequences of Section 167 of the Code. 359 F.2d 318, 330, (1956.) In sharp contrast to the old Sec-

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[4] Conf. Rep. No. 782—91st Cong., 1st Sess. 312-13(1969)

[5] *Alabama-Tennessee Natural Gas Co.,* 31 FPC 208, affirmed *sub nom. Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission,* 359 F.2d 318 (CA5), ceriorari denied, 385 U.S. 847.

[6] *Midwestern Gas Transmission Co.* v. *Federal Power Commission,* 388 F.2d 444, (CA7), certiorari denied, 392 U.S. 928.

tion 167 of the Code, the intent of Congress with respect to Sec. 441 of the Tax Reform Act of 1969 is clear. An objective reading of the latter section, together with its legislative history, will establish that Congress had carefully considered the regulatory consequences of the Act. Even the subtitle of the Act embracing Section 441 gives clear evidence of this. Regulatory language is used constantly throughout the entire section. Terms such as "normalization method of accounting"; "flow-through method of accounting"; "cost of service for rate making purposes"; "regulated books of accounts" have little or no significance except within the framework of regulation.[7]

Additionally, the special 180-day election, as to post-1969 public utility expansion property, entitled "Special Rules as to Flow-through Method" has no meaning except under regulation.

If one thing is clear, the legislative history surrounding the Tax Reform Act of 1969 makes it perfectly evident that the entire thrust of Section 441 of that Act was to restrict regulatory agencies in their handling of tax depreciation for rate making purposes.

In *Midwestern, supra,* the Commission imputed liberalized depreciation under circumstances where Midwestern could actually change back to liberalized depreciation for tax purposes. This is not like the present case where the Internal Revenue Regulations provide that an election under Sec. 441(a) of the Tax Reform Act of 1969 is "irrevocable."[8]

Petitioner would place a utility, such as Texas Gas, in a position of having its rates established

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[7] Int. Rev. Code § 167(l); 26 U.S.C.A. § 167(l).

[8] Income Tax Regulations, Sec. 1.167(l)-4(i).

as though it were using liberalized depreciation with flow-through for tax purposes when, under the terms of the Tax Reform Act, it could use only straight line depreciation. This would mean that Texas Gas would not recover its actual taxes paid contrary to the principles of this Court laid down in the leading case of *Galveston Electric Company* v. *Galveston,* 258 U.S. 388, 399 (1922). Certainly, in light of the legislative history of the Tax Reform Act of 1969, it cannot be assumed that Congress intended such a consequence. Rather, it is clear that, as found by the Court below:

> "... By means of Section 441(a) of the 1969 Tax Reform Act, Congress has provided regulated utilities such as Texas Gas with an absolute right of election to abandon flow-through with respect to their post-1969 expansion property. Furthermore, we do not have the situation presented in *Alabama-Tennessee Natural Gas Co.* v. *FPC., supra,* where the court was able to find 'no evidence that at the time Section 167 [of the Internal Revenue Code] was enacted Congress even focused on the problem in terms of reducing the dimensions of the Federal Power Commission's regulatory responsibility to protect consumers from excessive rates. . . .' Rather, investigation of the legislative history regarding Section 441(a) of the Tax Reform Act of 1969 reveals that Congress was well aware of the implications of permitting regulated utilities an election to abandon liberalized depreciation with flow-through with respect to their post-1969 expansion property. As such, the FPC was not remiss in the performance of its statutory duty in permitting Texas Gas to abandon flow-through in regard to its post-1969 expansion property, as expressly provided by the language of Section 441(a) of the 1969 Tax Reform Act." (Footnotes omitted - mimeo pp. 8, 9)

CONCLUSION

WHEREFORE, for the foregoing reasons and those set forth in the Brief for the Federal Power Commission in Opposition, the Petition for Writ of Certiorari in this cause should be denied.

Respectfully submitted,

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